No. 93-1828

IN THE
Supreme Court of the United States
October Term, 1993

STATE OF ARKANSAS *ex rel.* WINSTON BRYANT,
Attorney General of the State of Arkansas,
Petitioner,

v.

BOBBIE E. HILL, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE WASHINGTON LEGAL FOUNDATION, UNITED STATES REPRESENTATIVES ROBERT K. DORNAN, DANA ROHRABACHER, TILLIE K. FOWLER, GERALD B.H. SOLOMON, PETER I. BLUTE, BOB FRANKS, AND MARTIN R. HOKE; NEW YORKERS FOR TERM LIMITS; AND THE ALLIED EDUCATIONAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF THE PETITION

DANIEL J. POPEO
PAUL D. KAMENAR
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, N.W.
Washington, DC 20036
(202) 588-0302

TIMOTHY E. FLANIGAN
(Counsel of Record)
JONES, DAY, REAVIS & POGUE
Metropolitan Square
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for Amici Curiae

CASILLAS PRESS, INC. – 1717 K STREET, NW, WASHINGTON DC 20036 – 223-1220

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1828

STATE OF ARKANSAS *ex rel.* WINSTON BRYANT,
Attorney General of the State of Arkansas,

Petitioner,

v.

BOBBIE E. HILL, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

---

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE FOR THE WASHINGTON LEGAL FOUNDATION, ET AL., IN SUPPORT OF THE PETITION

The Washington Legal Foundation, *et al.*, hereby move, pursuant to this Court's Rule 37.2, for leave to file the attached brief *amici curiae* in support of the petitions for writs of certiorari in No. 93-1828 and No. 93-1456, both of which seek review of the same judgment of the Supreme Court of Arkansas. Counsel for the respondents has refused consent to the filing of this brief.

Amici curiae consist of the Washington Legal Foundation ("WLF"); United States Representatives Robert K. Dornan, Dana Rohrabacher, Tillie K. Fowler, Gerald B.H. Solomon, Peter I.

Blute, Bob Franks, and Martin R. Hoke; New Yorkers for Term Limits; and the Allied Educational Foundation. All *amici* have an interest in the outcome of the case *sub judice* in that it involves what have been called "term limits" on federal legislative offices.

WLF is a national nonprofit public interest law and policy center based in Washington, D.C., with over 100,000 members and supporters nationwide, including many voters residing in the State of Arkansas. WLF devotes substantial resources to litigating cases that raise issues of federalism and that affect the rights of voters and taxpayers. Along with some of the congressional *amici*, WLF has filed *amicus* briefs in support of term limits in *Legislature of California v. Eu*, 816 P.2d 1309 (Cal. 1991), *cert. denied*, 112 S. Ct. 1292 (1992), and *Lowe v. Kansas City Board of Election Commissioners*, 752 F. Supp. 897 (W.D. Mo. 1990).

United States Representatives Dornan, Rohrabacher, Fowler, Solomon, Blute, Franks, and Hoke are supporters of term limits in general and of Amendment 73 to the Arkansas Constitution in particular. They believe that term limits are constitutional, and, as members of Congress, they have a particular interest in whether term limits become effective. New Yorkers for Term Limits is a nonprofit organization dedicated to enacting term limits at the local level. The Allied Educational Foundation is a non-profit educational organization founded in 1964 and based in Englewood, New Jersey. It devotes substantial resources to promoting liberty and political freedom, and it has appeared with WLF as *amicus curiae* in numerous cases, including term limits cases.

In addition to the foregoing, WLF, *et al.*, have an interest in this case arising from their participation in *Thorsted v. Gregoire*, 841 F. Supp. 1068 (W.D. Wash. 1994), which is now on appeal to the United States Court of Appeals for the Ninth Circuit as *Thorsted v. Munro*, No. 94-35222, *etc.* Like the case *sub judice*, the *Thorsted* litigation raises the issue whether a state can, consistent with the United States Constitution, restrict the ability of multi-term incumbents to have their names placed on the ballot for re-election to the United States Senate or the United States House of Representatives. WLF, *et al.*, filed briefs *amici curiae* with both

the district court and the court of appeals in that litigation, arguing that the State of Washington's attempt to restrict access to the ballot for federal legislative office comported with the system of dual sovereignty between the states and the federal government established by Article I of the Constitution and confirmed by the Tenth Amendment. If this Court grants the petitions in No. 93-1828 and No. 93-1456, the Court's subsequent decision on the merits will likely control the outcome of the *Thorsted* litigation.

There are two additional reasons why the attached brief *amici curiae* would bring relevant matter to the attention of the Court that has not already been brought to its attention by the petitioners. First, neither petitioner has suggested that the Court defer consideration of the petitions until the Court has an opportunity to consider a petition to review the decision of the Ninth Circuit in the *Thorsted* case, expected sometime later this year. Second, neither petitioner appears to have brought to the Court's attention certain arguments based upon the Tenth Amendment. The attached brief *amici curiae* addresses those two issues.

For these reasons, the Court should grant this motion for leave to file the attached brief *amici curiae* in support of the petitions for writs of certiorari in No. 93-1828 and No. 93-1456.

Respectfully submitted,

DANIEL J. POPEO
PAUL D. KAMENAR
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 588-0302

TIMOTHY E. FLANIGAN
(Counsel of Record)
JONES, DAY, REAVIS & POGUE
Metropolitan Square
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for Amici Curiae

June 3, 1994

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1828

STATE OF ARKANSAS *ex rel.* WINSTON BRYANT,
Attorney General of the State of Arkansas,

Petitioner,

v.

BOBBIE E. HILL, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

---

BRIEF OF THE WASHINGTON LEGAL FOUNDATION, ET AL., AS AMICI CURIAE IN SUPPORT OF THE PETITION

INTEREST OF THE AMICI CURIAE

Amici curiae file this brief in support of the petitions for writs of certiorari in No. 93-1828 and No. 93-1456, both of which seek review of the same judgment of the Supreme Court of Arkansas. *Amici curiae* consist of the Washington Legal Foundation; United States Representatives Robert K. Dornan, Dana Rohrabacher, Tillie K. Fowler, Gerald B.H. Solomon, Peter I. Blute, Bob Franks, and Martin R. Hoke; New Yorkers for Term Limits; and the Allied Educational Foundation.

In addition to their individual interests as set forth in the preceding motion for leave to file, *amici curiae* have a collective interest in this case that arises from their participation in *Thorsted v. Gregoire*, 841 F. Supp. 1068 (W.D. Wash. 1994), which is now on appeal to the United States Court of Appeals for the Ninth Circuit as *Thorsted v. Munro*, No. 94-35222, *etc.* Like the case *sub judice*, the *Thorsted* litigation raises the issue whether a state can, consistent with the United States Constitution, restrict the ability of multi-term incumbents to have their names placed on the ballot for re-election to the United States Senate or the United States House of Representatives. WLF, *et al.*, filed briefs *amici curiae* with both the district court and the court of appeals in that litigation, arguing that the State of Washington's attempt to restrict access to the ballot for federal legislative office comported with the system of dual sovereignty between the states and the federal government established by Article I of the Constitution and confirmed by the Tenth Amendment.

The Washington Legal Foundation, *et al.*, are filing this brief *amici curiae* to encourage the Court to defer consideration of the petitions in No. 93-1828 and No. 93-1456 until the Court has an opportunity to consider a petition to review the decision of the Ninth Circuit in the *Thorsted* case, expected sometime later this year. Such a deferral would give this Court the opportunity to consider at one time the entire range of constitutional issues implicated by the ballot access restrictions recently enacted by Arkansas, Washington, and thirteen other states. If the Court chooses not to defer consideration of the petitions, *amici curiae* encourage the Court to grant the petitions, because (among other things) the judgment below does violence to the system of dual sovereignty established by the Constitution.

ADDITIONAL STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions cited by the petitioners, *amici* would bring the following statutory provisions to the Court's attention. All of these statutes were enacted as part of Initiative Measure 573, adopted by the people of the State of Washington at their election of November 3, 1992.

1. Section 4 of Initiative 573, to be codified at Wash. Rev. Code § 29.68.015, provides:

> No person is eligible to appear on the ballot or file a declaration of candidacy for the United States [H]ouse of [R]epresentatives who, by the end of the then current term of office will have served, or but for resignation would have served, as a member of the United States [H]ouse of [R]epresentatives during six of the previous twelve years.

2. Section 5 of Initiative 573, to be codified at Wash. Rev. Code § 29.68.016, provides:

> No person is eligible to appear on the ballot or file a declaration of candidacy for the United States [S]enate who, by the end of the then current term of office will have served, or but for resignation would have served, as a member of the United States [S]enate during twelve of the previous eighteen years.

3. Section 6 of Initiative 573, to be codified at Wash. Rev. Code § 29.51.173, provides:

> Nothing in [sections 4 or 5] prohibits a qualified voter of this state from casting a ballot for any person by writing the name of that person on the ballot in accordance with [Wash. Rev. Code § 29.51.170] or from having such a ballot counted or tabulated, nor does anything in [sections 4 or 5] prohibit a person from standing or campaigning for an elective office by means of a write-in campaign.

4. Section 7(2) of Initiative 573, to be codified at Wash. Rev. Code § 29.15.240(2), provides:

> No terms or years served in office before November 3, 1992, may be used to determine eligibility to appear on the ballot.

The complete text of Initiative Measure 573 is reprinted in *Thorsted v. Gregoire*, 841 F. Supp. 1068, 1085–86 (W.D. Wash. 1994).

REASONS FOR DEFERRING CONSIDERATION OF THE PETITIONS

The ballot access restrictions at issue in this case, section 3 of Amendment 73 to the Arkansas Constitution, provide that after a person has been elected to three or more terms (six years) as a member of the United States House of Representatives, or to two or more terms (twelve years) as a member of the United States Senate, he or she "shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to [those respective offices]." Pet. App. 69a.[1] As interpreted by the Supreme Court of Arkansas, Amendment 73 allows incumbents to run as write-in candidates and to serve if elected by the voters. *Id.* at 15a. The ballot access restrictions at issue in the *Thorsted* litigation now pending in the Ninth Circuit, Washington State's Initiative Measure 573, are nearly identical in structure. Under the election laws added by Initiative 573, "[n]o person is eligible to appear on the ballot or file a declaration of candidacy for the United States [House of Representatives or Senate]" who has served in the respective office for six years (out of the last twelve) or twelve years (out of the last eighteen), although such persons may run for office "by means of a write-in campaign." Wash. Rev. Code §§ 29.68.015, 29.68.016, 29.51.173.

Thus, the laws of both Arkansas and Washington prohibit a three-term incumbent of the House or a two-term incumbent of the Senate from having his name printed on the ballot for re-election to a succeeding term in office. Because only terms of service beginning after the 1992 election will count under these rules, *see* Pet. App. 25a; Wash. Rev. Code § 29.15.240(2), neither law will begin to restrict access to the ballot for the office of United States Representative until 1998 or United States Senator until 2004.

Given their structural similarity, the ballot access restrictions of Arkansas and Washington not surprisingly raise the same constitutional issues. For example, the questions presented by the peti-

---

[1] "Pet. App." refers to the petition appendix in No. 93-1456.

tions for writs of certiorari in both No. 93-1828 and No. 93-1456 concern various clauses of Article I of the Constitution, in particular, the Elections Clause, art. I, § 4, cl. 1, and the Qualifications Clauses, art. I, § 2, cl. 2, and § 3, cl. 3.[2] These are precisely the constitutional provisions at the heart of the *Thorsted* case pending in the Ninth Circuit. *See* 841 F. Supp. at 1081 ("The challenged parts of [Washington's] Initiative 573 must therefore be held to impose additional qualifications for Congress in violation of Article I, Sections 2 and 3."); *id.* at 1082 ("Even if viewed as an attempt to regulate the electoral process [under Article I, Section 4, Clause 1], the federal office sections of the Initiative would have to be held invalid.").

There are several reasons, however, why the *Thorsted* case, rather than the case *sub judice*, may provide the more appropriate occasion for the Court to consider the constitutionality of state ballot access restrictions for incumbent federal legislative officeholders. For these reasons, the Court may wish to defer consideration of the petitions in this case until it receives a petition to review the Ninth Circuit's judgment in *Thorsted*, which is likely to be issued later this year.

First, lurking in these ballot access cases are important questions of justiciability, namely, standing and ripeness.[3] In the deci-

---

[2] The question presented in No. 93-1828 is whether

> a state has the power under the Elections Clause of the Constitution, Art. I, § 4, Cl. 1, to restrict an incumbent candidate's access to the ballot [for the offices of United States Representative or Senator], or whether the Qualifications Clauses of the Constitution, Art. I, § 2, Cl. 2, and § 3, Cl. 3, prohibit a state from imposing such a ballot access restriction.

Similarly, if somewhat less specifically, the question presented in No. 93-1456 is whether "Article I of the Constitution forbid[s] a state to decline to print on its election ballots the names of multi-term incumbents in the House of Representatives and Senate."

[3] In particular, as stated above, neither Arkansas' Amendment 73 nor Washington's Initiative Measure 573 will operate to restrict access to the

sion below, the Supreme Court of Arkansas (understandably) did not give heed to the "Case or Controversy" requirement of Article III of the Constitution or to this Court's analyses of that requirement, and instead relied on state-law standards to conclude that the challenge to Arkansas' Amendment 73 was justiciable. *See* Pet. App. 7a–9a (citing four Arkansas decisions that set forth state-law standards with respect to declaratory relief, ripeness, and justiciability). In this circumstance, this Court's review of the case *sub judice* may be clouded by the thorny issue

> whether, under federal standards, the case was nonjusticiable at its outset because the original plaintiffs lacked standing to sue; and if so, whether [the Court] may examine justiciability at this stage because the [state] courts heard the case and proceeded to judgment, a judgment which causes concrete injury to the parties who seek now for the first time to invoke the authority of the federal courts in the case.

ASARCO, Inc. v. Kadish, 490 U.S. 605, 612 (1989); *see also id.* at 612–24 (discussing justiciability issues); *id.* at 633–34 (Brennan, J., concurring in part and concurring in the judgment) (same); *id.* at 634–35 (Scalia, J., concurring in part and dissenting in part) (same).

By contrast, the *Thorsted* case does not present this complication. There the district court carefully analyzed the constitutional law of justiciability, including the decisions of this Court in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992); *Anderson v. Celebreeze*, 460 U.S. 780 (1983); and *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 580–81 (1985). *See* 841 F. Supp. at 1072–75. The Ninth Circuit is bound to consider these issues as well, even if the defendants-appellants do not press them.

---

ballot before the 1998 congressional elections. Even then, only those who have served three consecutive terms in the House of Representatives—that is, who have won election in 1992, *1994*, and *1996*—will be affected. No candidate for United States Senate can possibly be affected until 2004.

As the case would come to this Court, therefore, the *ASARCO* issue would not divert the Court's attention.

Second, ballot access restrictions for multi-term incumbents raise colorable issues concerning the freedom of speech and freedom of association of candidates and voters under the First and Fourteenth Amendments. Such issues are squarely presented in the *Thorsted* case, where the plaintiffs "allege[d] that Initiative 573's restrictions on candidacies for Congress are invalid . . . under the First and Fourteenth Amendments." 841 F. Supp. at 1071–72. The district court based its decision to strike down Initiative 573's restrictions in part on that ground, holding that the law violated these two Amendments (among other provisions). *Id.* at 1080. By contrast, the court below did not appear to have considered these issues. *See* Pet. No. 93-1828 at 8 n.6 ("The Arkansas Supreme Court did not address the question whether, as applied to federal office, Amendment 73 violates Article IV of the Constitution or the First and Fourteenth Amendments.").

Third, although they are nearly identical, Arkansas' Amendment 73 and Washington's Initiative Measure 573 differ in one important regard: the length of time that a multi-term incumbent is restricted from the ballot. Amendment 73 renders ineligible to appear on the ballot "[a]ny person having been elected to three or more terms as a member of the United States House of Representatives from Arkansas" and "[a]ny person having been elected to two or more terms as a member of the United States Senate from Arkansas." Pet. App. 69a. These restrictions are unqualified; they are not affected by the passage of time. Washington's Initiative Measure 573, on the other hand, sweeps somewhat more narrowly: an incumbent Representative is rendered ineligible to appear on the ballot only if he has served in that office "during six of the previous twelve years," and an incumbent Senator is ineligible only if he has served "during twelve of the previous eighteen years." Wash. Rev. Code §§ 29.68.015, 29.68.016. That is, after a six-year rotation out of office, a multi-term incumbent may again appear on the ballot in a bid to represent the people of Washington in the United States Congress. The Court may wish to consider

these differences in ruling on the constitutionality of ballot access restrictions.

Deferring consideration of the petitions for writs of certiorari until review is sought of the Ninth Circuit's judgment in the *Thorsted* case will permit the Court to review all of the relevant issues at one time and without the complications that arise because the case *sub judice* comes from a state court that is not bound by the Case or Controversy requirement of Article III.

REASONS FOR GRANTING THE WRITS

If the Court does not choose to defer consideration of the petitions for writs of certiorari, the petitions should be granted. The petitioners in both No. 93-1828 and No. 93-1456 have advanced compelling reasons why the Court should review the judgment of the Supreme Court of Arkansas in this case. Essentially, this case presents constitutional issues of great moment, the resolution of which will have a dramatic impact on the composition and character of the United States Congress. Beginning in 1990, the people of fifteen states either have established ballot access restrictions for multi-term incumbents of federal legislative office or have more directly limited the number of terms that an individual may serve as a United States Representative or Senator. These provisions will apply to 156 Representatives (nearly 36% of the total) and to 30 Senators. *See generally* Pet. No. 93-1828 at 14 & nn.11 & 12; Pet. No. 93-1456 at 8 & nn.7 & 8. It is fair to say that "[t]he term limits movement, embracing both printed ballot restrictions and term limitations, is the most significant grassroots political phenomenon of recent years," *id.* at 8, and that the case *sub judice* accordingly "involves some of the most important election law issues ever to come before this Court," Pet. No. 93-1828 at 13.

The petitioners have also demonstrated that the decision below conflicts with the decisions of the federal courts of appeals in *Hopfmann v. Connolly*, 746 F.2d 97, 102–03 (1st Cir. 1984), *vacated in part on other grounds*, 471 U.S. 459 (1985) (per curiam); *Joyner v. Mofford*, 706 F.2d 1523, 1531 (9th Cir.), *cert.*

denied, 464 U.S. 1002 (1983); and *Public Citizen, Inc. v. Miller*, 992 F.2d 1548 (11th Cir. 1993) (per curiam), *aff'g and adopting* 813 F. Supp. 821, 832–33 (N.D. Ga. 1993). *Accord Stack v. Adams*, 315 F. Supp. 1295, 1298 (N.D. Fla. 1970) (three-judge court) (per curiam). The decision below also stands in conflict with the decisions of several state courts of last resort, including the widely relied upon case of *State ex rel. O'Sullivan v. Swanson*, 257 N.W. 255, 255–56 (Neb. 1934). Finally, the petitioners have shown that the decision below is inconsistent with several of this Court's own decisions, particularly *Storer v. Brown*, 415 U.S. 724 (1974), and that the Supreme Court of Arkansas improperly failed to apply these decisions because it misread *Powell v. McCormack*, 395 U.S. 486 (1969).

Amici offer the following additional reasons why the Court should review the decision below. That decision rejected the argument that Arkansas' Amendment 73 is "a regulatory measure falling within the State's ambit under [Article I, Section 4, Clause 1 of the Constitution]," Pet. App. 14a, and concluded that the power to impose ballot access restrictions on multi-term federal legislative incumbents "is not a power left to the states under the Tenth Amendment," *id.* at 15a. These holdings are contrary to the Court's decisions concerning the balance of power between the states and the federal government.

I. AMENDMENT 73 IS AN EXERCISE OF THE EXPRESS POWER GRANTED TO THE STATES BY THE CONSTITUTION TO PRESCRIBE THE TIMES, PLACES, AND MANNER OF HOLDING ELECTIONS FOR SENATORS AND REPRESENTATIVES.

The decision below failed to give heed to the principle that "the Constitution grants to the States a broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives.'" *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986) (quoting U.S. Const. art. I, § 4, cl. 1). This Court has repeatedly "recognized the breadth of those powers: 'It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections . . . .'"

Roudebush v. Hartke, 405 U.S. 15, 24 (1972) (footnote omitted) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

That the states have primary responsibility for the regulation of federal legislative elections has been recognized since the Founding Era. Defending Article I, Section 4 of the proposed Constitution against criticism that it would give too much power to Congress, Alexander Hamilton emphasized the primacy of the states in the "ordinary" cases: the Convention of 1787 had "submitted the regulation of elections for the Federal Government in the first instance to the local administrations." *The Federalist No. 59*, at 399 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Furthermore, the debate in the state ratifying conventions about Article I, Section 4 was framed by the understanding that whatever entity had power to regulate the time, place, and manner of federal legislative elections had very broad power indeed. *See* Stephen J. Safranek, *Term Limitations: Do the Winds of Change Blow Unconstitutional?*, 26 Creighton L. Rev. 321, 329–40 (1993). In summarizing the result of nearly two centuries of practice pursuant to the Constitution's mode of disposing power over congressional elections, this Court cited Article I, Section 4 and observed approvingly that "the States have evolved comprehensive . . . election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

Under *Storer* and other decisions of this Court, the ballot access restrictions imposed by Amendment 73 are a proper exercise of Arkansas' power to prescribe the times, places, and manner of holding federal legislative elections. The petitioners have developed this argument sufficiently, *see* Pet. No. 93-1828 at 18–21; Pet. No. 93-1456 at 9–15, and *amici* will not labor the point. There is, however, an additional and related argument that, except for a brief reference, *see id.* at 15, has gone unaddressed by the petitioners. That argument sounds in the Constitution's general reservation of powers to the states in the Tenth Amendment.

II. THE TENTH AMENDMENT CONFIRMS THE SPECIAL REGARD OF ARTICLE I, SECTION 4 FOR STATE REGULATION OF ELECTIONS FOR SENATORS AND REPRESENTATIVES.

The Tenth Amendment explicitly enshrines the fundamental principle that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Court has recently reaffirmed this point, stating that "our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399 (1991). Given its recognition of "the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government," *Gregory*, 111 S. Ct. at 2399, the Court must often take up "the task of ascertaining the constitutional line between federal and state power" drawn by the Tenth Amendment, *New York v. United States*, 112 S. Ct. 2408, 2417 (1992). This task is difficult and therefore tends to doctrinal confusion. *See, e.g., Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (5-4 decision) (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976) (5-4 decision)). Nevertheless, the task must be faithfully performed to give effect to the bedrock principle of "dual sovereignty" inherent in our Constitution.

The task of discerning the precise boundary between federal and state power is, happily, much less onerous in election law cases than in the majority of cases implicating the Tenth Amendment. First, as discussed more fully above, the Constitution itself commits specific power to the states to act in this area. The "constitutional line between federal and state power" in the election arena is drawn by Article I, Section 4, Clause 1: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the place of chusing Senators." Thus, states are explicitly granted authority to regulate federal elections *in the first instance*. *Cf. Roudebush v. Hartke*, 405 U.S.

15, 24 (1972) ("*Unless Congress acts*, Art. I, § 4, empowers the States to regulate the conduct of senatorial [and congressional] elections.") (emphasis added). Consistent with the Tenth Amendment, therefore, the courts should accord great respect to a state's exercise of its authority under Article I, Section 4—because the power to regulate elections in the first instance has not been delegated to Congress. That is, unless Congress acts to "alter" a state's regulation of federal legislative elections, the courts should not strike down such regulation.

Moreover, in contrast to *Garcia* and other decisions in which the Court has declined to apply the Tenth Amendment to invalidate an act of Congress as applied to the states, the present case involves no exercise of congressional power. Although it has indeed regulated other aspects of elections for its members, *see*, *e.g.*, 2 U.S.C. § 2c (1988) (providing, contrary to nineteenth-century practice, that Representatives shall be elected only from single-member districts and not at large), Congress has chosen *not* to regulate the facet of the electoral process at issue in this case. In the absence of any congressional action prohibiting or preempting the approach adopted by the people of the State of Arkansas in Amendment 73, the power to act in this arena is "reserved to the States, respectively, or to the people." *Cf. Gregory*, 111 S. Ct. at 2402 (The Tenth Amendment recognizes "the authority of the people of the States to determine the qualifications of their most important government officials."). In this case, the "people" of Arkansas, acting in accordance with their State's procedure for popular initiative and referendum, have exercised one of their reserved powers to prescribe rules for federal legislative elections.

Finally, this analysis accords with the Court's most recent teachings about the Tenth Amendment and the limits of congressional power under the Commerce Clause: states must look not to the judiciary for any "substantive restraint on the exercise of Commerce Clause powers," but instead they must rely on "the built-in restraints that our system provides through state participation in federal government action. The political process ensures that [national] laws that unduly burden the States will not be promul-

gated." *Garcia*, 469 U.S. at 554, 556; *see also South Carolina v. Baker*, 485 U.S. 505, 512–13 (1988). In the very same manner, the "political process," not the state or federal courts, should provide any necessary restraint on exercises of states' authority pursuant to Article I, Section 4 that are alleged unduly to burden national interests.

The Court applied essentially this principle in *Roudebush v. Hartke*, 405 U.S. 15, 23–26 (1972), when it concluded that the State of Indiana's recount procedures could be applied in a senatorial election. The Court acknowledged that "a State's verification of the accuracy of election results pursuant to its Art. I, § 4, powers is not totally separable from the Senate's power to judge elections and returns" pursuant to Article I, Section 5, Clause 1. *Id.* at 25. The lower court had found these powers inseparable, holding that a recount "would be an usurpation of a power that only the Senate could exercise." *Id.* at 24. This Court, however, found judicial intervention unjustified, because the Senate had the "ability to make an independent final judgment," that is, "[t]he Senate [was] free to accept or reject the apparent winner in [the initial count or the recount], and, if it chooses, to conduct its own recount." *Id.* at 25-26 (footnotes omitted). Accordingly, any perceived burden on national interests was best left to the political process.

In this case, Congress has the conceded authority to "alter" Amendment 73 if it unduly burdens national interests in the election of Senators and Representatives. So long as Amendment 73 does not infringe on the individual rights of any candidate or voter under the First and Fourteenth Amendments—and the petitioners ably, if briefly, demonstrate that it does not, *see* Pet. No. 93-1828 at 22–23 n.32; Pet. No. 93-1456 at 13 n.15—the courts should leave questions concerning the limits of state authority to the political process. Because the decision of the Arkansas Supreme Court does not accord with these principles, this Court should grant the petitions for writs of certiorari.

CONCLUSION

Consideration of the petitions for writs of certiorari in No. 93-1828 and No. 93-1456 should be deferred until this Court can consider a petition to review the decision of the United States Court of Appeals for the Ninth Circuit in *Thorsted v. Munro*, No. 94-35222, *etc.* Alternatively, the petitions should be granted.

Respectfully submitted,

DANIEL J. POPEO
PAUL D. KAMENAR
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 588-0302

TIMOTHY E. FLANIGAN
(Counsel of Record)
JONES, DAY, REAVIS & POGUE
Metropolitan Square
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for Amici Curiae

June 3, 1994